

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIG in R
77-6190

United States Court of Appeals
FOR THE SECOND CIRCUIT

In the Matter
Of The

Complaint Tug OCEAN PRINCE, INC., and RED STAR TOWING
& TRANSPORTATION Co., as Owner and Charterer of the
Tug "OCEAN PRINCE" for Exoneration from or Limita-
tion of Liability,

Plaintiffs & Third-Party Plaintiffs,
Appellees and Cross-Appellants,

vs.

UNITED STATES OF AMERICA,

Third-Party Defendant-Appellee.

AN APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PITTSTON MARINE TRANSPORT CORPORATION
DEFENDANT-APPELLANT'S BRIEF

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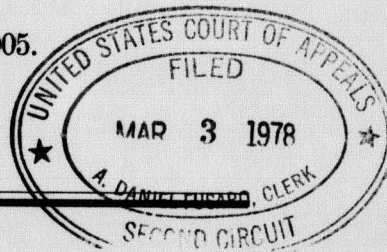


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PITTSTON MARINE TRANSPORT CORPORATION
DEFENDANT-APPELLANT'S BRIEF

Statement of Issues Presented for Review

Did the trial court err in entitling plaintiffs to limit their liability to the value of the tug "OCEAN PRINCE" and the value of her pending freight.

Statement of the Case

This action involved a suit brought by Tug Ocean Prince Inc., and Red Star Towing & Transportation Co. Plaintiffs-Appellees (herein Plaintiffs) respectively the Owner and Charterer of the tug "OCEAN PRINCE" seeking exoneration

from or limitation of liability pursuant to Title 46 USC § 183 et seq. for a casualty which occurred on February 3, 1974 in the waters of the Hudson River near Con Hook Island.

The Plaintiffs filed an ad interim stipulation for value in the amount of \$222,000.00, based upon an appraisal affidavit obtained from a marine surveyor.

Pittston Marine Transport Corporation Defendant-Appellant (herein Pittston) filed a claim in the limitation proceeding for \$366,617.22 damages sustained by the barge New London, a barge owned and operated by Pittston, and by the cargo laden thereon.

Thereupon the Plaintiffs filed a third-party action against the United States of America (herein the United States) alleging that the casualty was caused by the negligence of the United States in the maintenance of aids to navigation existing at the time of the casualty and by the failure of the United States to maintain aids which would have provided adequate warning to vessels in navigation.

Pittston thereafter cross-claimed against the United States for the amount of its damages and the United States filed a counter-claim against the Plaintiffs for \$169,201.47 the amount of money spent for clean-up after the casualty. The United States also instituted a separate action against the Plaintiffs and Pittston for the clean-up expenses. These actions were consolidated for purposes of trial.

The trial court found that the Plaintiffs were entitled to limit liability to the value of the tug OCEAN PRINCE and her pending freight and that Pittston was entitled to judgment therefore with costs. It further found that Pittston was not responsible for the oil spill and dismissed the United States' action against Pittston with costs.

The Court dismissed both Plaintiffs' and Pittston's claims in the third-party action as well as Pittston's counter-claim

against the United States in the action it instituted to recover the clean-up costs.

The Court found further that the Plaintiffs' liability to the United States for clean-up costs was limited to \$19,800.00.

It remanded the fine levied by the Coast Guard for reconsideration and dismissed Pittston's claim for indemnity for the fine.

Defendant Pittston has appealed from so much of the court's opinion which permitted Plaintiffs to limit their liability to the value of the "OCEAN PRINCE".

The Facts

On February 2, 1974 the tug OCEAN PRINCE, a vessel owned and chartered respectively by the plaintiffs Ocean Prince, Inc. and Red Star Towing & Transportation Co. took the loaded oil barge New London, a vessel owned and operated by the defendant Pittston Marine Transportation Corporation in tow at Esso Bayonne. The vessel was bound to Kingston, New York.

At about 0130 on February 3rd when the tug and its tow reached Con Hook, an area about 3 miles south of West Point, the tug caused the barge New London to strike a rock which is well known as a hazard to navigation thereby causing damage to the barge and loss and damage to its cargo.

At the time of the accident the tug was under the command of Walter Reimer. He had served aboard the vessel about one and a half years as Mate, Alternate Captain, and Captain while she was in Southern waters. After the vessel came north Reimer left on an extended vacation. The OCEAN PRINCE was thereafter put into service in the New York area. When Reimer returned to the vessel on February 2, 1974, the day the ill-fated voyage commenced,

the OCEAN PRINCE had been working here about two months but as of that date Reimer had never navigated in the Hudson River.

Kiernan, the other man assigned to the pilothouse, had considerable experience and familiarity with the local waters. He had been hired by the Plaintiffs on February 1, 1974 and assigned to the OCEAN PRINCE on a temporary basis.

When the OCEAN PRINCE began her voyage with the NEW LONDON she was without a captain. Neither Reimer nor Kiernan had been briefed as to their respective assignments, neither was assigned as captain and neither was therefore advised, as captain, of his crew's level of experience.

Kiernan had been on watch from the time the vessel made up to the New London at Bayonne until they reached Haverstraw Bay. He was relieved by Reimer at about 2330 hours. At this time the visibility was about 2 miles with snow flurries and there was considerable ice in the river. Reimer continued with the watch until the grounding at 0130 at which time Kiernan was called to the Pilot House and took over until the tug and tow were turned around and brought alongside the dock at Bear Mountain.

Pittston asserts (a) that two of the Court's findings of fact in and of themselves require denial of Plaintiffs' request for limitation of liability and that (b) the other important findings taken as a whole show Appellant totally failed to sustain its burden of proving the incident occurred without its privity, if not its knowledge.

In respect of Pittston's first contention the controlling findings are:

Finding No. 36:

"the grounding of the barge NEW LONDON resulted, in part from Reimer's lack of knowledge of local landmarks and experience on the Hudson River."

Finding No. 20:

"While the plaintiffs knew that Reimer lacked familiarity with the Hudson when he rejoined the OCEAN PRINCE on February 2, it was assumed that this lack of experience would be discussed between Reimer and Kiernan when they met on the vessel."

These and the other findings relevant to Pittston's position will be discussed.

Argument

The factors which contributed to the casualty were within Plaintiffs' privity and knowledge

It is well settled that findings of fact made by the trial court acting as the trier of the fact are not to be disturbed unless "clearly erroneous." *McAllister v. United States*, 1954, 348 US 19, 20. Pittston urges that the findings of the trial court are sufficient to justify the denial of the right to limitation as a matter of law.

When the Plaintiffs agreed to tow the barge New London from Bayonne, New Jersey to Kingston, New York in February, they assumed the obligation to perform the towage agreement with the reasonable care and maritime skill required. *National Transport Corp. v. Abqaiq*, 1970 A.M.C. 213, 418 F(2d) 1241; *Howlett v. Tug Dalzellido*, 1971 A.M.C. 1389, 324 FSupp. 912; *South v. Moran Towing and Transportation Co.*, 1966 A.M.C. 1987, 360 F(2d) 1002.

Plaintiffs knew the conditions that could be expected to be encountered on a voyage from Bayonne, New Jersey to Kingston, New York during the ice season. Specifically they knew that the U.S. Coast Guard, the agency charged with the responsibility of maintaining aids to navigation, remove the lighted buoy usually positioned south of Con Hook, and replace it with an unlighted black can buoy.

The Coast Pilot and Light List, navigational aids published by the Coast Guard, provide the prudent navigator with this information (Findings 41 and 42 p. 24a).*

The conditions described in the Coast Pilot and Light List did in fact exist and required the exercise of such "reasonable care and maritime skill as prudent navigators employ in the performance of similar services".

During the performance of the towage contract the tug OCEAN PRINCE stranded the barge New London on a rock marked by an unlighted can buoy (Finding #30 p. 21a). Walter Reimer was in sole charge of the OCEAN PRINCE at the time of the stranding and while he held a license issued by the U.S. Coast Guard had never navigated in the Hudson River (Finding #16 p. 15a). Reimer was unfamiliar with the warnings not to rely on buoys during the ice season, as he had not examined the Coast Pilot and Light List carefully (Finding #37 p. 23a). Had he been familiar with the area he would have known that there were ample fixed shore marks and the contour of the shore, which he could have used to follow the course of the OCEAN PRINCE and fix its position. (Fraccaro pp. 487a & 498a). "The grounding of the Barge resulted in part from Reimer's lack of knowledge of local landmarks and experience on the Hudson River" (Finding #36 p. 23a).

The District Court held Plaintiffs guilty of negligent navigation and therefore liable for the damage suffered by Pittston and the United States. In granting Plaintiffs the right to limitation of liability, the Court implicitly found that the casualty occurred without Plaintiffs' privity and knowledge. Clearly, this implication is wholly contrary to the Court's findings that various of Plaintiffs' managing officials knew that Reimer lacked familiarity with the Hudson River (Finding #20 p. 16a), and that

* All page references are to pages in the Joint Appendix.

the casualty resulted in part from this very inexperience (Finding #36 p. 23a).

In reaching its conclusion the District Court has held that mere presence on board a vessel of an individual with experience is sufficient. Pittston maintains that it is not. In the case before this court Mr. Kiernan, an experienced Hudson River Pilot, entered Plaintiffs' employ on a temporary basis two days before the stranding (Finding #17 p. 15a). Kiernan had met Reimer sometime during the day preceding the accident for the first time but knew that he was regularly assigned to the vessel. He was not aware of Reimer's lack of experience (Finding #19 p. 16a). He was also not aware nor was he advised that he and not Reimer had been designated as the Master of the vessel by Plaintiffs' management personnel (Kristiansen Text, p. 66a) (Keenan Text, p. 774a) (Kiernan, pp. 391a-395a).

It would seem, that Plaintiffs' contention, that its management personnel exercised the high degree of care required to avoid this clearly foreseeable accident, founded upon the proposition that it was enough to require at least one of the two navigators aboard their tugs to have experience on the waters to be traversed and that such navigator be available to assist the other when necessary or if requested by the man on watch, has been accepted by the District Court in toto to arrive at its decision (Finding #12 pp. 13a, 14a).

There may be some validity to Plaintiffs' contention if it had been proven that both men aboard the OCEAN PRINCE were aware of Plaintiffs' internal policy. There is absolutely no proof that Kiernan knew of it, having only been hired by the Plaintiffs two days before the stranding (Finding #17 p. 15a), or that Reimer had any knowledge of this policy.

Moreover the proof is clear that there was confusion as to who was the master of the tug (Finding #21 p. 19a).

Kiernan, it will be argued and the court so found "took certain steps" which were usually carried out by the captain. However, he explains away his actions (p. 352a). He related that his standing the traditional Captain's watch resulted from the alternating of watches (p. 352a). He took care of the paper work because nobody was doing it (p. 430a). He took over the con of the tug after the accident because of Reimer's emotional state (p. 376a).

These actions were taken by Mr. Kiernan not because he was the Captain of the tug but because of his years of experience. He knew what had to be done and carried on accordingly. At (p. 355a) he stated: "I understood it, your Honor, that I was going over there as mate."

It is readily apparent that there can be no more grievous fault than a vessel without a master or indeed any job without a recognized boss. The record contains no proof with respect to what Kiernan and Reimer knew of each other's experience and qualifications. The District Court found that "... It is the Captain's duty to know the experience and qualifications of the mate" (Finding # 21 p. 17a). Who was to raise the question? Neither of the pilot house personnel had been told who was the master. Kiernan was aboard when Reimer joined the vessel. He could not have known that Kiernan had never worked for the company before and was justified in waiting for Kiernan to inquire about his experience. Reimer testified that he was the mate (p. 100a). It is not expected that a man assigned to a tug for approximately 11½ years will proclaim his shortcomings before being asked. At the same time Kiernan's actions cannot be criticized. He knew that his assignment to the OCEAN PRINCE was temporary. He knew that Reimer was a permanent man on the vessel and he did not know that the managing personnel in the company considered him to be the Captain. He was justified in believing that Reimer was the person in charge.

However, to permit this situation to develop, that is to permit a tug to make up to a loaded oil barge and proceed towards a destination through waters that required at least some special knowledge of the conditions that would be met without clearly defining and advising its personnel as to which one of them had the ultimate responsibility of command, was clearly a negligent act on the part of Plaintiffs' managing personnel. Surely Plaintiffs' management was not exercising the degree of care required when it assigned the OCEAN PRINCE to perform the towing contract and failed to advise its pilot house personnel of their respective assignments and experience.

Kristiansen—the Vice President of operations testified as follows (pp. 283a, 284a):

The Court: How does your company determine when they have two mates aboard which one of them will be the Captain?

The Witness: The Personnel Department will make a specific assignment as to who is Captain and who is Mate, but if there are two Mates aboard, generally we don't designate one of the two Mates as Captain. Generally we try to have an individual who normally fills a Captains job on the boat.

The Court: In this instance were both the persons Mates?

The Witness: No, they were not.

The Court: They were both Captains.

The Witness: They had both served as Captains, yes sir.

The specific assignment described by Mr. Kristiansen must of necessity contain some advice to the person being assigned.

The testimony obtained and proof submitted contains no reference to any specific information with respect to positions being given to either of the two men. As a matter

of fact the proof that was obtained clearly indicates that the men were not given any specific assignment.

We submit further that the proof obtained from Mr. Keenan, Plaintiffs' dispatcher, clearly indicates the disorganized state of Plaintiffs' personnel department.

(At p. 708a)

Q. You stated that John Kiernan was captain. How did you know that Kiernan was captain?

A. I was told by the day dispatcher, Mr. Robert Fitch, and I might have seen it from a crew list. Either from the crew list or been told by the day man.

* * * *

(p. 731a)

Q. At that time you had a conference with Mr. Fitch and you discussed using the Ocean Prince with the qualifications of the men that were on board that were going to steer the tug? Were they discussed?

A. They were.

Q. Was it resolved at that time that Mr. Kiernan had experience in the Hudson River?

A. It was.

Q. And that Mr. Reimer had no experience?

A. That is correct.

Q. Do you know what time you notified the Ocean Prince that she was to do the towing? Do you have any indication on your job card?

A. Well, I dispatched the boat from Bushey's to Con Hook at 1800, so I imagine I would have given that order approximately that time.

Q. At about that time?

A. Between 1730 and 1800.

* * * *

(pp. 732a, 733a)

Q. Did you discuss at that time, did you notify—did you ask to talk to Captain Kiernan at that time?

A. I don't think so.

Q. Did you in fact, talk to Captain Kiernan at any time from the time you came on watch until the time the Ocean Prince was dispatched to tow the tug New London?

A. I don't think I talked to him.

Q. Did you talk to him when you dispatched the vessel?

A. I am not sure.

Q. Would you have recognized Captain Kiernan's voice if you heard it?

A. I would have.

Q. Yet you don't recall?

A. I do not.

Q. Did you have any conversation with the man with whom you talked with respect to the qualifications of the pilothouse crew?

A. You mean with the day dispatcher, Mr. Fitch?

Q. With the man on the boat with whom you spoke.

A. No.

Q. No discussion at all?

A. No.

* * * *

(pp. 734a, 735a)

Q. Am I correct that you did not discuss the qualifications of the pilothouse personnel with either of the two men?

A. With either of the two men on the boat, no.

Q. As a matter of practice, Mr. Keenan, if you have a man who does not have experience in certain local waters and you know him to have been engaged in towing operations outside New York and as you said you had minimal contacts with Mr. Reimer because he was down south and that you would have had an occasional single side-band radio message with him, do you make it a practice to advise the other man on the boat of the man's experience?

A. A practice, no.

Q. Do you have any instructions from the office to advise the other man on the boat with respect to the experience or lack of experience of the man with whom the pilothouse is being shared?

A. No. We assume they will talk to each other.

Q. You assume they will talk to each other. Is this the standard you follow in dispatching vessels?

A. It is.

Q. And it is a practice that is followed in the office?

A. It is, to my knowledge.

Q. Is there any instruction, either written or oral handed down by the chief dispatcher to all the dispatchers to discuss the experience of the personnel in the pilothouse?

A. There is nothing written like that that I know of.

* * *

(At P. 742a)

Mr. Keenan in answering a question asked by the Court with respect to how the pilot house personnel and specifically Mr. Reimer would have learned of his assignment answered as follows:

The Witness: Well, the most reasonable way to have done that thing back then would be to have told Mr. Reimer coming aboard what position he was to hold and that would have settled the matter.

The Court: How would it have advised Kiernan of the fact he had been advanced from mate to captain by telling Reimer unless Reimer happened to mention it to Kiernan?

The Witness: It would be something that he wouldn't fail to mention in my opinion. We assume that the men converse and tell each other things.

Plaintiffs' management personnel knew all of the facts, but took not one step to reduce the exposure of the barge New London to the risk of damage resulting from those facts.

In its opinion after pointing out that navigation by tugs is usually done by "site of eye" and that "piloting" is carried on "from known landmarks and aids to navigation", the court stated (pp. 31a-34a)

"Consequently, intimate familiarity with the waters and hazards is far more important than in ocean navigation. An unfamiliar helmsman requires assistance from an experienced one. It is the responsibility of the Captain to see that the inexperienced navigator (who could be himself) gets such assistance. This responsibility, along with certain administrative chores, is one of the few distinguishing factors between the duties of a Captain and that of a Mate."

Following the above the court stated:

"Plaintiffs appreciated this factor in assigning a crew to the Ocean Prince, but an unfortunate set of circumstances created unforeseen confusion relating to which of the watch standers was to assume the position of Captain. Much of the uncertainty stemmed from the fact that Reimer, one of the watch standers on the night in question, had been a regular pilothouse watch stander aboard the Ocean Prince. He had served as both Mate and Captain when the vessel was stationed in the South. After Reimer had left for an extended vacation, the vessel was brought to New York. Reimer had no experience in piloting the Hudson.

The day before Reimer returned to the Ocean Prince, the Mate then aboard took leave. Needing an experienced man, plaintiffs called upon an associated company to supply a suitable person. They sent John

Kiernan, a tugboat captain with 30 years experience on the Hudson River. When Kiernan came aboard on February 1, 1974, the preceding Captain was still there, so Kiernan started as Mate. The next day Reimer rejoined the vessel and the Captain left. Kiernan knew that Reimer was a full-time employee of plaintiff, regularly assigned to the vessel, and qualified to act as its Captain. He did not know that Reimer had not been aboard the vessel during the couple of months it had been operating on the Hudson or that he had *never* navigated the Hudson on any vessel.

The vessel commenced the voyage in question shortly after Reimer came on board and during the half day preceding the grounding, the two had only two brief discussions. Kiernan contends that, since he was only a replacement, and it was Reimer's regular vessel, he believed Reimer was the Captain. Kiernan, however, occupied the Captain's cabin, stood the watch traditionally taken by the Captain and performed certain administrative tasks which were the Captain's responsibility. (Kiernan maintains that he was forced to assume these tasks after the grounding due to Reimer's extremely upset emotional state.)"

Plaintiffs' management was responsible for this "unfortunate set of circumstances". Whether the "confusion" created thereby was "unforeseeable" as distinguished from "unforeseen" is a serious question when considered with the duties and obligations of the managing officials of a company which undertakes a towing operation under such circumstances. Some managing official should have told Kiernan, "you are captain until further notice and your mate Reimer has never navigated the Hudson River." For management to assume that the men would discuss these circumstances between themselves as was stated by Mr. Keenan (p. 742a) takes away the label of an "unfortunate set of circumstances" and casts the Plaintiffs in the posi-

tion of being responsible for the stranding and resultant damages.

This information should have been given to Kiernan when the assignment to perform the towage contract was given to the OCEAN PRINCE.

In *Ben Franklin Transportation Company v. Scow Charles H. Sells*, 1937 A.M.C. 774, Judge Learned Hand sets forth the legal standard for judging "a proper display of nautical skill" as three variables: the actuarial possibility that the event will occur; the gravity of the damage, if it does; the expense and effort to fend against it. When the fact pattern of the case before this court is reviewed with this standard as a guide it is evident that Plaintiffs failed completely to exercise the reasonable skill required to carry out the towage agreement. They made no effort to advise the pilot house personnel of the tug OCEAN PRINCE as to who was the master nor to advise their designated master of his co-worker's lack of experience in the Hudson River. No expense would be incurred to give this information to the proper person as Plaintiffs had their own radio communications system. The damages which could have been expected and which in fact were sustained exceed one-half million dollars. Plaintiffs in effect have admitted that they realized that a casualty could occur. To minimize the risk they followed a pattern of assigning an experienced man with an inexperienced man. They should have taken the next logical step and notified the pilothouse personnel of their respective assignments and experience and not assume it would be learned through conversation.

All of the foregoing clearly demonstrates Plaintiffs' privity and knowledge of the factors which contributed to the casualty.

As we mentioned previously, Finding #36 of the Court's Findings of Fact reads as follows:

"The grounding of the Barge New London resulted, in part, from Reimers lack of knowledge of local landmarks and experience on the Hudson River."

The court found that Plaintiffs knew of the lack of experience (Finding #20 p. 16a) thus, the court has held that Plaintiffs had "privity and knowledge" of one of the contributing causes of the stranding. This by itself is sufficient grounds to deny them limitation of liability. *Smith Voyager-Limitation Proceeding*, 439 F(2d) 109, 1971 A.M.C. 1147; *In the Matter of the vessel Marine Sulphur Queen*, 460 F(2d) 89, 1972 A.M.C. 1122; *Petition of United States Dredging Corp.*, 223 FSupp. 730, 1964 A.M.C. 748; *Kenneth Daniels v. Trawler Sea-Rambler*, 1970 A.M.C. 1449; *Empire Sea Foods v. Anderson*, 398 F(2d) 204, 1968 A.M.C. 2664.

We have discussed the self evident reasons why Plaintiffs were negligent in assuming that Kiernan, who had not been told he was master of the OCEAN PRINCE, should ask Reimer a regular employee of Plaintiffs whether he knew conditions to be expected in the Hudson River and that Reimer would not volunteer the information, if not asked.

In its opinion the District Court stated "It remains a mystery why Reimer did not seek assistance as navigation became progressively more difficult due to the treacherous river conditions" (p. 33a).

We submit one answer is that Reimer did not have enough experience to know that he needed help. He did not know that the lighted buoy had been removed as is customary. He testified he was following the chart and was looking for the can buoy as indicated on the chart (p. 172a). When he examined the chart and learned that the symbol was for a lighted buoy—he demonstrated surprise. The court found that he had not examined the Light List or Coast Pilot very carefully (Finding #37 p. 23a).

While all critical management officials knew of Reimer's lack of experience on the Hudson River no one bothered to advise Kiernan. One call to Kiernan on the ship to shore radio, a means of communication always available, would have avoided the confusion and lack of information which in part caused the damages to the Barge New London and the United States. Surely the inattention on the part of Plaintiffs' management was not representative of the high degree of care required for the towage of loaded oil barges in the winter in the Hudson River.

There is one other plausible explanation for Reimer's non-disclosure of his total lack of experience in the waters being traversed. Although the court found that Reimer had been a tug boat operator for at least five years, of which one and one-half had been in Plaintiffs' employ in southern waters, there is nothing to indicate that he had any experience in New York harbor waters excepting a one month tour of duty on another of Plaintiffs' tugs prior to the southern assignment. A good part of the one month was in the Providence area (p. 149a).

He would have been very unpopular with the Plaintiffs' other captains if they had to assist him through every watch he stood. Obviously he felt that he could navigate anywhere by following a chart for the area to be traversed.

If Reimer had advised Kiernan of his lack of familiarity with the Hudson River, Kiernan would have had to be on watch for at least 13½ hours continuously before reaching Kingston, their destination, not to mention the return voyage. Kiernan went on watch at 1800 hours—simultaneously with the receipt of orders to tow the Barge New London to Kingston (Findings 18 and 22 pp. 15a-17a). He was due to and went off watch just prior to midnight (Finding 26 pp. 18a, 19a). When the stranding occurred at 0130 on February 3rd (Finding #33 p. 22a) the tug and barge were 2 miles north of Bear Mountain Bridge (Finding #35 p. 22a) and about midway to their destination.

Six hours and fifteen minutes had elapsed since the beginning of the voyage as they started out at 1915 hours on February 2nd (Finding #26 pp. 18a-20a). The tug still had an equal distance to cover. Assuming that the vessel could make the same time in the heavier ice up river, Kiernan would have had to be on duty from 1800 hours on February 2nd to at least 0715 hours the next morning with a return trip through the same waters still ahead of them. Reimer may well have reasoned that no Captain would agree to work under those conditions and concluded that silence and careful use of the chart was the best policy.

Even if Reimer's silence was premised on the above reasoning, it can not shield the Plaintiffs as their managing personnel knew that Kiernan would have to work more than twelve hours without rest and in deliberate disregard of their duty to exercise a high degree of care in the performance of the towage contract, dispatched the OCEAN PRINCE on a job assignment improperly manned.

Plaintiffs' management officials created a situation ripe for the occurrence of an error in navigation. That such error was the proximate cause of the casualty was foreseeable and as such within their privity and knowledge.

It is well settled that the existence of privity and knowledge is determined on the facts of each individual case. *Corylell v. Phipps*, 317 U.S. 406, 1943 AMC 18; *Giboney v. Wright*, 517 F.(2d) 1054, 1057; 1975 AMC 2071, 2075.

It is also well settled that an owner is charged with privity and knowledge when "he has failed in his duty" to exercise "due diligence and has sent out a ship unseaworthy in some respect that proximately contributes to the loss". *Gilmore & Black, The Law of Admiralty* (2d Ed. 1975). Sec. 10-20, pp. 877-878.

The assignment of work to the various captains and mates employed by Red Star was a function delegated

to the dispatchers. Walter Kristiansen, the Operations Manager for Red Star Marine Services, stated that the dispatchers made these assignments on the basis of the man's experience (p. 269a). The dispatchers were said to have acquired knowledge of the man's experience through contacts over the VHF and SSB communications systems in use between plaintiffs' offices and the tugs (p. 725a). Reimer stated that he never met nor did know any of the dispatchers and that he was not able to recognize their voices (p. 160a). We can assume that he must have had limited contact with them.

Following the reasoning of the decision in *Spencer Kellogg & Sons v. Hicks*, 285 U.S. 502, 1932 AMC 503, an owner cannot delegate authority in all instances to one whose privity and knowledge cannot be imputed to the corporation.

This same principle was followed in *Monsanto Co. v. Port of St. Louis*, 350 F.Supp. 502, 1974 AMC 2389.

In *Great Atlantic & Pacific Tea Co. v. Brasiliero*, 159 F.(2d) 661, 1947 AMC 306, 312 (2 Cir. 1947), the court stated:

"With the duty to make inquiry 'the measure' of the knowledge is not what the owner knows, but what he is charged with finding out."

The owners and operators of the tug OCEAN PRINCE knew of Reimer's lack of experience and failed to notify the other man assigned to the pilothouse. It was his lack of experience in the Hudson River and lack of knowledge as to what to expect that caused this casualty. It was this lack of experience and knowledge that rendered the tug unseaworthy—said unseaworthiness coming within the privity and knowledge of the owner.

This reasoning was followed in *Petition of Canal Barge Co.*, 1973 AMC 843, a case with a very similar fact pattern.

In *Avera v. Florida Towing Company*, 322 F. (2d) 155, 1963 AMC 2110, the Court stated:

"Once we hold that Coppedge, as did Stover in *Linseed King*, had the duty of making inspection and inquiry, it follows without any question that through him the corporation is chargeable with privity and knowledge of Avera's incompetency and the tug master's negligence in taking him aboard as deckhand without first giving him adequate instruction. * * *

In *The Lady Pike*, at page 14, 21 Wall. 1, 22 L.Ed. 499, the Court stated:

"Ignorance of the danger before them is no sufficient excuse, as the owner appoints the master and is bound to select one of competent skill and knowledge, to transport goods and merchandise shipped on board in safety, which necessarily imposes the obligation to employ a master mariner who knows enough about the route to avoid the known obstructions and to choose the most feasible track for his route. Knowledge of the kind, in river navigation, is peculiarly essential, as the current frequently shifts from one side towards the other, and the track of navigation is often obstructed by snags, sandbars, and shoals, which no degree of skill would enable the mariner or pilot to avoid without a prior knowledge of their existence."

This decision has been followed in other towing cases and is applicable here. The district court rejects the holding in "The Lady Pike" holding "The Temple Bar", 137 F.(2d) 293 to be the modern authority. Pittston urges that "The Temple Bar" is not a proper authority for the district court's position as it was not concerned with river navigation.

In *Midwest Towing Co. v. Anderson, Adm.* 317 F(2d) 270, 1963 AMC 2376 the Court of Appeals for the Seventh Circuit in reviewing the lower court's ruling stated at

p. 2379 "The finding of negligence on the part of the master does not negate the findings made by the district court that the unseaworthiness also contributed to the cause of the disaster. * * *" The precise reason for the finding of negligence was not spelled out in the district court's opinion because petitioner admitted and urged the master's negligence primarily in an effort to establish that negligence as the sole cause of the accident and thus limit its liability.

There is substantial evidence to show that the unseaworthiness of the "Cooper" was within the privity and knowledge of the petitioner and hence, its application for limitation of liability was properly refused."

These cases clearly demonstrate that where the plaintiff, by prior action or inaction, sets into motion a chain of circumstances which may be a contributing cause even though not the immediate or proximate cause of a casualty, the right to limitation is properly denied. *Waterman Steamship Corporation, et al. v. Gay Cotton et al.*, 414 F.(2d) 724, 1969 AMC 1682 at 1700. The Court of Appeals for the Ninth Circuit in discussing the lower court's findings with respect to certain radio direction finder fixings stated "But the failure to have an 'efficient' radio direction finder is sufficient to deny limitation of liability if it merely combined with crew's negligence in using it to be one of the causes of the stranding."

The failure to post a lookout was a violation of a statutory requirement

The district court erred when it disregarded Finding #38 (p. 23a) which reads: "Reimer failed to post a lookout when conditions were such that same was required."

Title 33 USC § 221 reads in part:

"Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof from the con-

sequences of * * * any neglect to keep a proper lookout."

Reimer testified in pre-trial depositions which were read by the trial court and received as part of the record, that he was alone in the wheelhouse at the time of the casualty. He stated that his deckhand was making coffee. He was alone some 1,750 yards south of the location of the charted obstruction when he experienced difficulty in locating the buoy which was placed as a marker to assist vessels in navigating the area.

He maintains that he was not able to locate it visually or with the radar and, in spite of these difficulties, he did not direct Hebert, the deckhand, to go forward to serve as a lookout.

The failure to utilize the deckhand as a lookout is a statutory violation with which the OCEAN PRINCE is charged. It is well settled that the master steering a tug and tow is not a proper lookout, as the lookout must have no duties other than to look and report. *The Supply No. 4*, 109 F.(2d) 101; *Dwyer Oil Transport Co. v. The Edna M. Matton*, 255 F.(2d) 380.

In *The Ocean Queen Limitation Proceeding*, reported at 1976 AMC 1404 at page 1415, Judge Motley, in ruling on the plaintiff's right to limitation, stated:

"The Court notes that, since the precise cause of the tug's sharp leftward turn is uncertain, plaintiffs had the burden of proving lack of privity and knowledge with respect to at least the most likely causes—failure to maintain a proper lookout, . . ."

The opinion refers to whether the corporation's managers had constructive notice that lookouts were not assigned. Kristiansen, in his deposition, admits that the deckhands were used for purposes other than lookout while the ves-

sel was being operated and that such practice was known by him. Limitation of liability was denied.

The Plaintiffs' failure to post a proper lookout invokes the application of The Pennsylvania Rule.

The vessel must show that the violation of this statutory rule, "absence of a lookout", could not have been one of the causes of this casualty. See, also, *In re Seaboard Shipping*, 449 F.(2d) 132, 1971 AMC 2145.

In its opinion the district court stated "There was no proof whatever that a lookout forward could have observed the ice stranded buoy. The buoy according to the evidence was not visible until freed from the ice by the wake of the passing tug."

However, the court did find that Kiernan was able to observe the black can buoy 50-75 feet off the starboard beam of the tug when he entered the pilothouse immediately after the collision and while the tug and barge were still proceeding in a northerly direction (Finding #35).

We submit that the record contains no proof that the violation of the statutory rule could not have been one of the causes of the casualty and that plaintiffs must be denied limitation of liability.

Conclusion

The order of the trial Court that Plaintiffs are entitled to limit their liability to the value of the tug OCEAN PRINCE and the amount of her pending freight should be vacated and an order entered denying the Plaintiffs the right to such relief and directing the entry of judgment in favor of Pittston Marine Transport Corporation for the amount of its damages.

Respectfully submitted,

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In The Matter of
Tug Ocean Prince et al.

Plaintiffs and Third Party Plaintiffs
Appellees and Cross Appellants

v.
United States of Americas

Third Party Defendant-Appellee

**AFFIDAVIT
OF SERVICE**

STATE OF NEW YORK,

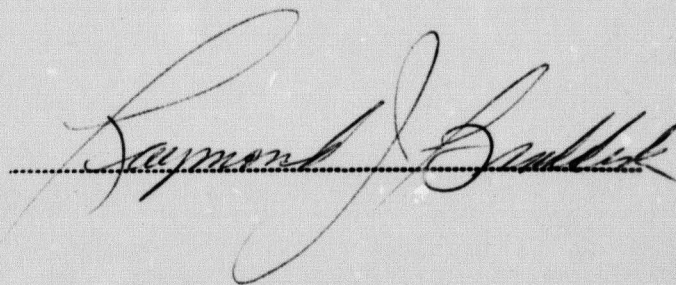
COUNTY OF New York, ss:

Raymond J. Braddock, agent for McHugh Heckman Smith & Leonard
being duly sworn,
deposes and says that he is over the age of 21 years and resides at
11 Park Place New York, New York
That on the 3rd. day of March 19 78 at
26 Federal Plaza New York, New York
he served the annexed Brief and Appendix (Vols 1 & 2) upon
Thomas J. Cahill U.S. Attorney, Att: William Losquadro Esq.
in this action, by delivering to and leaving with said attorney
2 true cyps thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the
person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 3rd. day of March 19 78.



ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 19